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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

* * *

NO. 1468

* * *

STEVE SCOTT AND
CINNE ARTS THEATRE, INC.,
Petitioners

v.

THE STATE OF TEXAS,
Respondent

* * *

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

* * *

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent herein, and files this its response to Petitioners' application for writ of certiorari heretofore filed herein.

OPINION BELOW

The opinion of the Supreme Court of Texas was delivered on November 11, 1970, and the motion for rehearing was denied on December 16, 1970. The case is reported at 460 S.W.2d 103.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3). The judgment of the Supreme Court of Texas became final on December 16, 1970, when Petitioners' motion for rehearing was denied. According-

ly, the jurisdictional requirements would appear to be satisfied although Respondent disputes Petitioners' contention that any substantial federal question is presented.

QUESTION PRESENTED

Respondent does not feel that the questions detailed by Petitioners in the application for writ of certiorari are properly before this court for determination.

Rather Respondent is of the opinion that the sole question is:

Should this Court decide the constitutional issues that will, perhaps ultimately be presented, where

(a) Petitioner is not under any criminal charge, and

(b) The Texas obscenity statute involved is clearly not facially overbroad nor otherwise constitutionally deficient, and

(c) There is no showing of bad faith law enforcement procedures by state officers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and the provisions of Vernon's Texas Penal Code, Article 527 are adequately set forth in Petitioners' appendix.

STATEMENT OF THE CASE

This case arose when the County Attorney in Wichita County, Texas, filed suit in the District Court of Wichita County, Texas, 89th Judicial District. This suit was filed on January 20, 1970, and sought to enjoin Petitioners herein from showing some seven

named films alleged to be obscene. The suit was filed pursuant to the authority contained in Section 13, Article 527, Vernon's Texas Penal Code. The relief sought was:

(1) A temporary restraining order directing that the pictures not be altered in any way or be removed from the county, but be presented to the judge for reviewing;

(2) A temporary injunction, and

(3) A permanent injunction against exhibiting obscene matter or possessing such matter for exhibition.

The temporary injunction hearing was set for trial January 22, 1970, at 9:00 a.m. Petitioners filed numerous motions in the injunction proceedings including a "Motion to dismiss this lawsuit and motion to declare the Texas Obscenity Statute, Article 527, Unconstitutional and Void."

The trial court granted Defendants' motion and found Article 527 of the Penal Code to be unconstitutional. No hearing was held on the issue of obscenity, and no evidence was heard on the State's application for injunctive relief.

On direct appeal to the Supreme Court of Texas, by the State of Texas, the Supreme Court reversed and remanded the case to the District Court for further proceedings. It is this reversal that Petitioners seek to review here.

ARGUMENT AND AUTHORITIES

WHERE NO CRIMINAL CHARGES ARE PENDING

It will at once be seen that the State of Texas does not contemplate the bringing of criminal charges

against Petitioners in the instant case. As reflected by the opinion of the Texas Supreme Court, the trial court expressly granted immunity from criminal prosecution but then proceeded to hear argument on the State's application for injunctive relief. Clearly Section 13 of Article 527, V.P.C. contemplates that the civil injunctive route may be selected as an alternative or as additional means of suppressing the showing of matter which is found to be obscene. While the course chosen in the instant case is civil rather than criminal, as Petitioner points out in his application for certiorari, at page 27, a Defendant who is sued under Section 13 is brought into court in a proceeding that is quasi criminal. Thus it would seem that the rationale and philosophy of *Younger v. Harris,* 91 S.Ct. 746 (1971), *Samuels v. Mackel,* 91 S.Ct. 764 (1971); *Dyson v. Stein,* 91 S.Ct. 769 (1971); *Perez v. Ledezma,* 91 S.Ct. 674 (1971), would militate against interference with attempted suppression of materials alleged to be obscene so long as the Petitioner may continue to assert his federally protected rights in the state courts. While Petitioner here does not urge upon this Court any explicit contention that he is likely to suffer irreparable harm, certaintly there can be no showing of any harm greater than that found by a three judge Federal Court in *Byrne v. Karalexis,* 306 F.2d 1363 (1969), that is, that a "motion picture is a diminishing asset." However, this Court found very little difficulty in setting aside the order of the three-judge Court and remanding where, "There was, however, no finding by the District Court that the threat to Appellee's federally protected rights is 'one that cannot be eliminated by his defense in a single criminal prosecution.' " *Byrne v. Karalexis,* 91 S.Ct. 777 (1971). In the instant case there is no way of knowing what sort of harm is likely to befall Petitioner, since the state district court

chose to render judgment in favor of Petitioner without first having heard any evidence on the issue of obscenity or any evidence in support of the State's application for injunctive relief. It seems clear that the philosophy of *Younger* and the other U.S. Supreme Court cases cited above would require that the State be allowed to complete its efforts to enforce the statute before a federal court should decide that the procedures utilized were constitutionally defective.

Attorneys representing the State would however, represent to the Court that the place of business which is alleged to have been showing the films under attack is no longer in business and that Petitioner is not engaged in the business of showing obscene films in the jurisdiction of the 89th District Court. Therefore no further injunctive relief or criminal prosecution is contemplated nor indicated.

WHERE THE TEXAS OBSCENITY STATUTE IS CLEARLY NOT FACIALLY OVERBROAD NOR OTHERWISE CONSITUTIONALLY DEFICIENT

Time and time again, the provisions of the Texas Obscenity Statute have been under scrutiny, both by the Supreme Court of Texas and the federal judiciary. A quite similar Georgia statute was considered by a three-judge federal district court in *Gable v. Jenkins*, 309 F.Supp. 998 (N.D.G.A. 1969), affd. 397 U.S. 592 (1970). There the three-judge federal court found that the Georgia Obscenity Statute did two things, i.e., it prohibits the distribution of obscene materials and defines what is meant by obscene materials. In alluding to that portion of the Georgia statute which defines obscenity, the Court observes that the Georgia statute utilizes the definition of obscene material as

that term has been elucidated by the United States Supreme Court in *Roth v. United States,* 354 U. S. 476, 77 S.Ct. 1304 (1957) and a book named *John Cleland's Memoirs v. Massachusetts,* 383 U.S. 413, 86 S.Ct. 975 (1966). The Texas statute has trod precisely the same path. First the Texas legislature drafted the language of Article 527 with a rather studious effort to have such language comport with the holding in *Roth,* supra. After the later case, *Memoirs,* supra, the Texas legislature in 1969 expanded the definition of obscenity in the Texas statute so as to include the three elements which must independently be established before an item, a book or a movie may be held to be obscene:

> "(a) The dominent theme of the material taken as a whole appeals to a prurient interest in sex;
>
> "(b) the material is patently offensive because it affronts community standards related to the description or representation of such sexual matters; and
>
> "(c) the material is utterly without redeeming social value."

This definition of obscenity as contained in the 1969 Statute has been approved by a three-judge federal court in *Newman v. Conover,* 313 F.Supp. 623 (N.D. Tex. 1970) and in *Fontaine v. Dial,* 303 F.Supp. 436 (W.D. Texas 1969). In *Newman* the Court viewing all the provisions of Article 527 found only that Section 9 thereof was constitutionally deficient for the reason that the search and seizure provisions thereof did not afford a prior adversary hearing to determine the issue of obscenity before seizure of the so-called obscene material. All else within Article 527 was viewed with approbation.

Indeed that portion of Article 527 which is under

attack in the instant case, Section 13, provides for a determination of obscenity under a procedure quite similar to that approved by this court in *Kingsley Books v. Brown,* 77 S.Ct. 1325 (1957).

Petitioner at page 27 of his application for the writ questions the procedural safeguards afforded a Defendant against whom an injunction is sought pursuant to Section 13. Rule 690 of the Texas Rules of Civil Procedure provides in pertinent part:

> "The defendant to an injunction proceeding may answer as in other civil action . . ."

The legislature in enacting Section 13 here under attack did nothing to abrogate the above quoted rule. This is the teaching of the majority opinion of the Texas Supreme Court in rendering the decision below when referring to the unauthorized type pleading advanced by Petitioner and made the basis of the trial court's unauthorized judgment. 460 S.W.2d 103, 107. The provisions of Section 13, which entitle a defendant to a trial of the issues within one day, a procedure approved by this Court in *Kingsley,* merely provide for an acceleration of the proceedings so as to minimize the chilling effect that a more protracted procedure might otherwise have on the First Amendment rights of a Defendant. Certainly if a Defendant desires to avail himself of all the due process and procedural safeguards afforded by the Texas Rules of Civil Procedure and particularly the provisions of Rule 690, he may do so.

Finally, the affirmance of *Gable,* supra, would seem to settle once and for all the constitutionality of the *Georgia* obscenity statute as well as its Texas counterpart, Article 527. Some doubt, however, was cast upon the limit to which this court would extend the inter-

pretation of *Stanley v. Georgia,* 394 U.S. 557 (1969), when this Court placed *Byrne v. Karalexis* on its pending calendar during this term. In disposing of *Byrne,* however, the Court chose not to write on the three-judge Court's analysis of *Stanley.* Thus one is led beyond cavil that *Stanley* cannot be interpreted to cover anything other than the possession of obscene materials in the privacy of one's home—nothing more.

WHERE THERE IS NO SHOWING OF BAD FAITH LAW ENFORCEMENT PROCEDURES BY STATE OFFICERS

The trial judge in not taking any evidence on the State's application for injunctive relief, leaves the record barren of any indication of bad faith prosecution. From the record before this Court there is only the showing of one single instance of State officers attempting to rid their community of an evil denounced by Article 527. To provide for injunctive relief as an alternative to criminal prosecution is peculiarly within the province of the legislature. *Kingsley,* supra, 77 S.Ct. 1325, 1328; *Tigner v. State of Texas,* 310 U.S. 141, 148, 60 S.Ct. 879, 882 (1940). There is no showing of the bad faith attempts at chilling First Amendment rights denounced in *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116 (1965).

CONCLUSION

For the foregoing reasons Respondent respectfully submits that there is not present in the instant case any substantial federal question and therefore no reason for granting the writ. Petitioner does not cite any of the reasons for granting the writ contained in Rule 19,1(a), and none are present.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Max P. Flusche, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief in Opposition has been served on counsel for the Respondents by depositing same in the United States Mail, postage prepaid, addressed to Mr. Mel S. Friedman, Maley and Friedman, Houston Bar Center Building, 723 Main Street, Suite 410, Houston, Texas 77002 and Mr. Stanley Fleishman, 6922 Hollywood Boulevard, Suite 718, Hollywood, California 90028, on this ____ day of May, 1971.

MAX P. FLUSCHE
Assistant Attorney General